Office Supreme Court, U.S.
F I L E D
SEP 8 1983
ALEXANDER L. STEVAS, CLERK

NO. 82-282

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

Thomas C. McCain, et. al.,

Appellants,

vs.

Charles E. Lybrand, et. al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

APPELLEES' BRIEF ON THE MERITS

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH
Senior Assistant
Attorney General

Post Office Box 11549
Columbia, SC 29211

KAREN LeCRAFT HENDERSON*

Post Office Box 11458
Columbia, SC 29211

(803) 765-1885

CHARLES W. COLEMAN

Post Office Box 70
Edgefield, SC 29824

ATTORNEYS FOR APPELLEES

*Counsel of Record

QUESTION PRESENTED

Whether or not the district court was correct in holding that the current method of electing the members of the Edgefield County Council has been pre-cleared by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act of 1965.

TABLE OF CONTENTS

	Page
Statement.....	1
Summary of Argument.....	14
Argument:	
The district court was correct in holding that the current method of electing the members of the Edgefield County Council has been pre-cleared by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act of 1965.....	16
A. Act No. 1104 of 1966....	16
B. Act No. 521 of 1971.....	18
I. Act No. 521, which amended the election provisions of Act No. 1104 of 1966, was submitted to the United States Attorney General pursuant to Section 5 and was pre-cleared....	18
II. The pre-clearance of Act No. 521 of 1971 pre-cleared the at-large with residency districts election of a five-member Edgefield County Council for two year terms of office.....	21

III. The Justice Department's regulations neither are nor should be controlling here..... 36

IV. The preclearance of Act No. 521 of 1971 renders moot the Attorney General's 1980 "please submit" letter..... 43

V. The method of election prescribed by Act No. 521 of 1971 is unchanged by the enactment of the "home rule" legislation and the adoption of the implementing ordinance and resolution..... 46

VI. The Attorney General's preclearance of Act No. 521 of 1971 is not subject to judicial review..... 56

Conclusion..... 62

TABLE OF AUTHORITIES

CASES:	Page
Allen v. State Board of Elections, 393 U.S. 544 (1969).....	29, 30, 31, 53, 59
Automobile Club of Michigan v. C.I.R., 353 U.S. 180 (1957).....	38
Berry v. Doles, 438 U.S. 190 (1978).	46
Briscoe v. Bell, 432 U.S. 404 (1977).....	56
City of Lockhart v. United States, ___ U.S. ___, 74 L.Ed.2d 863, 103 S.Ct. 998 (1983).....	27
City of Mobile v. Bolden, 446 U.S. 55 (1980).....	3, 13
City of Rome v. United States, 446 U.S. 156 (1980).....	29, 30, 31
Duncan v. The County of York, 267 S.C. 327, 228 S.E.2d 92 (1976).	45
Garcia v. Uvalde County, 455 F.Supp. 101 (1978), aff'd 439 U.S. 1059 (1979).....	25, 48
Georgia v. United States, 411 U.S. 526 (1973).....	48, 59
Harris v. Levi, 416 F.Supp. 208 (D.D.C. 1976), aff'd in part and vacated in part on other grounds and remanded sub nom. Harris v. Bell, 562 F.2d 772 (D.C. Cir. 1977).....	37, 38
Horry County v. United States, 449 F.Supp. 990 (1978).....	53

	Page
Jenness V. Little, 306 F.Supp. 925 (N.D.Ga. 1969).....	
McCain v. Edwards, 272 S.C. 539, 252 S.E.2d 924 (1979).....	8
McCain v. Lybrand, 376 F.Supp. 304 (D.S.C. 1974), rev'd sub nom. Lytle v. Commissioners of Election, 509 F.2d 1049 (4th Cir. 1974), cert. denied 419 U.S. 1032 (1974).....	2, 3
Mandel v. Bradley, 432 U.S. 173 (1977).....	33
Miller v. United States, 294 U.S. 435 (1935).....	38
Morris V. Gressette, 432 U.S. 491 (1977).....	15, 35, 36, 37, 43, 50, 56 - 60
Perkins v. Matthews, 400 U.S. 379 (1971).....	17, 53
Rogers v. Lodge, ___ U.S. ___, 73 L.Ed.2d 1012, 102 S.Ct. 3272 (1982).....	4
Service v. Dulles, 354 U.S. 363 (1957).....	37
State Board of Election Commissioners v. Evers, 405 U.S. 1001 (1972).....	54
United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110 (1978).....	29, 30, 31, 51

Page

United States v. Georgia, C.A. No. C76-1531A (N.D.Ga. 1977), aff'd 436 U.S. 941 (1978)..... 31, 38, 42, 43, 52

United States v. Saint Landry Parish School Board, 601 F.2d 859 (5th Cir. 1979)..... 43

Van Fore v. Cooke, 273 S.C. 136, 255 S.E.2d 339 (1979)..... 11

Woods v. Hamilton, 473 F.Supp. 641 (D.S.C. 1979)..... 11, 47, 48, 49, 52

CONSTITUTIONAL PROVISIONS:

Constitution of South Carolina, 1895, as amended

Article VIII, Section 7..... 7, 45

Constitution of the United States

Amendment I..... 2

Amendment XIII..... 2

Amendment XIV..... 2

Amendment XV..... 2, 43

STATUTORY PROVISIONS:

Code of Laws of South Carolina, 1962, as amended

§§ 14-201 through 14-210 5

	Page
§§ 14-251 through 14-258	5
Code of Laws of South Carolina, 1976, as amended	
§ 4-9-10.....	7, 45, 49
§ 4-9-10(a).....	49
§ 4-9-10(b).....	8, 49, 50
§ 4-9-10(c).....	61
§ 4-9-30.....	49
South Carolina statutes at large	
Act No. 1104 of 1966 [54 STAT. 2767 (1966)].....	passim
Act No. 55 of 1967 [55 STAT. 55 (1967)].....	6
Act No. 1318 of 1968 [55 STAT. 3100 (1968)].....	6
Act No. 521 of 1971 [57 STAT. 989 (1971)].....	passim
Act No. 1042 of 1974 [58 STAT. 2224 (1974)].....	6, 7
Act No. 283 of 1975 [59 STAT. 692 (1975)].....	7
United States Code	
42 § 1971.....	2
42 § 1973 c[§ 5, 1965 Voting Rights Act].....	passim
42 § 1983.....	2

Page

MISCELLANEOUS:

Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on Extension of the Voting Rights Act, 97th Cong., 1st Sess. ser. No. 24, pt.3, 2239 (1981)..... 18

Hearings on H. R. 939 ... Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong. 1st Sess. ser. No. 1, pt.1, 537 (1975)..... 18

28 C.F.R. § 51.2(d)..... 53

28 C.F.R. § 51.12..... 53

38 C.F.R. § 51.14..... 55

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

Thomas C. McCain, et. al.,

Appellants,

vs.

Charles E. Lybrand, et. al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

APPELLEES' BRIEF ON THE MERITS

STATEMENT OF THE CASE

This appeal is from the order of the three-judge district court dated May 10, 1982, holding that the current method of electing the members of the Edgefield County Council has not been put into effect in violation of Section 5 of the Voting Rights Act of 1965 and denying the appellants' request for injunctive relief. J. S. App. beginning at 1a.

The appellants are two black voters of Edgefield County, South Carolina, and the defendants are the five members of the Edgefield County Council, the three members of the Edgefield County Board of Election Commissioners and the president of the executive committee of the Edgefield County Democratic Party. J.S. App. 2a.

The appellants filed their original complaint in this action on February 26, 1974, alleging, first, that the at-large method of electing the Edgefield County Council diluted black voting strength in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments and 42 U.S.C. §§ 1971, 1973 and 1983 and, second, that the Edgefield County Council residency districts were malapportioned. J.A. 1. On May 16, 1974, the district court granted summary judgment to the appellants on their malapportionment claim. McCain v. Lybrand, 376 F.Supp. 304 (D.S.C. 1974). The Fourth

Circuit Court of Appeals, however, reversed sub nom. Lytle v. Commissioners of Election, 509 F.2d 1049 (4th Cir. 1974), and this Court subsequently denied a petition for a writ of certiorari. McCain v. Lybrand, 419 U.S. 1032 (1974). J.A. 133.

The dilution issue was tried on November 24 and 25, 1975, and, on April 17, 1980, the district court entered an order finding that the at-large method of election infringed on the appellants' rights to due process and equal protection of the laws in connection with their voting rights. J.A. 30. On April 25, 1980, the appellees moved to alter, amend or vacate the judgment on the basis of the intervening decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). Their motion was granted on August 11, 1980, with leave to introduce additional evidence on the issue of intent to discriminate. J.A. 84. Before that hearing could be conducted, however, the appellants were allowed to amend their 1974

complaint to add their claims under Section 5 of the 1965 Voting Rights Act, which necessitated the convening of the three-judge district court. J.A. 102, 119. The "intent" hearing remains pending before the district court, the appellants having moved to reinstate the April 17, 1980, order on the basis of Rogers v. Lodge, __ U.S. __, 73 L. Ed. 2d 1012, 102 S.Ct. 3272 (1982). [1/]

On and prior to November 1, 1964, Edgefield County was governed by a board of county commissioners, consisting of an elected county supervisor and two commissioners appointed by the Governor upon the recommendation of the Edgefield County legislative delegation. The duties, powers and functions of the Edgefield County Board of Commissioners were prescribed by Sections

---

1/ The district court held a hearing on the motion to reinstate on November 5, 1982, and took the motion under advisement pending this appeal. Docket Sheet entry of November 5, 1982.

14-201 through 14-210 and 14-251 through 14-258 of the 1962 Code of Laws of South Carolina, as amended. J.A. 142.

On June 1, 1966, the South Carolina General Assembly enacted Act No. 1104 creating the Edgefield County Council. It consisted of three members elected for terms of two years, with one member with the largest plurality elected from the county at-large from each of three designated residency districts as prescribed by Act No. 1104. J.A. 154. Although Act No. 1104 of 1966 was a voting qualification or prerequisite to voting, or standard, practice or procedure different from that in force or effect in Edgefield County on November 1, 1964, the lower court found that it was neither submitted to the United States Department of Justice for pre-clearance nor judicially reviewed by the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights

Act of 1965. J.S. App. 6a. [2]

Act No. 1104 of 1966 was amended on June 25, 1971, by Act No. 521, which was submitted to the United States Attorney General pursuant to Section 5 on July 21, 1971. Brief for the United States as Amicus Curiae App. 1a. The United States Attorney General, after requesting additional information, advised the Office of the South Carolina Attorney General by letter dated November 24, 1971, that he interposed no objection to its provisions. J.S. App. 43a.

Act No. 1104 of 1966 was also amended in 1967 (Act No. 55), in 1968 (Act No. 1318) and in 1974 (Act No. 1042). J.A. 171. Those acts did not alter the method of election of the

---

[2] The appellants' repeated assertions to the contrary notwithstanding [Appellants' Brief on the Merits 8, 18, 35, 36] the appellees have not stipulated that Act No. 1104 of 1966 was never pre-cleared. Rather, the appellees concede that "there are no records discovered to date which indicate" that the 1966 legislation was pre-cleared. J.A. 131. See n.9, infra at 17.

Edgefield County Council and, except for Act No. 1042 of 1974, they were not submitted to the United States Department of Justice for pre-clearance or to the United States District Court for the District of Columbia for judicial review. J.A. 220. Act No. 1042 of 1974 was submitted to the Justice Department for pre-clearance and no objection was interposed to its provisions. Id.

Then, in 1975, pursuant to Article VIII of the South Carolina Constitution, the General Assembly of South Carolina enacted Act No. 283, the "home rule" legislation, now codified as Sections 4-9-10 et seq. of the 1976 Code of Laws of South Carolina. Act No. 283 authorized all South Carolina counties to select by referendum one of five forms of county government before July 1, 1976. If no referendum had been held by then, the county automatically had as of that date the form of government, including method of election, "most nearly corresponding to the

form in effect immediately prior to that date" [§4-9-10(b), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended], which, in the case of Edgefield County, the General Assembly determined to be the council-administrator form. J.A. 133. The method of election remained that prescribed by Act No. 521 of 1971 [J.A. 140], which had theretofore been pre-cleared pursuant to Section 5 of the Voting Rights Act. The home rule legislation itself was pre-cleared by the United States Attorney General on August 28, 1975. J.S. App. 17a.

Edgefield County did not conduct a referendum on the question of the form of government (including method of election) prior to July 1, 1976, because no proper petition was timely filed as held in McCain v. Edwards, 272 S.C. 539, 252 S.E. 2d 924 (1979). J.A. 135. 3/

3/ The appellants state that "[t]here was substantial support for a referendum in

On March 29, 1976, the appellants filed a motion herein to enjoin the upcoming 1976 election for the Edgefield County Council, which motion was denied on April 14, 1976. J.A. 135.

On June 21, 1976, the Edgefield County Council enacted a resolution and ordinance which formally adopted the council-administrator form of county government and continued the method of election prescribed by Act No. 521 of 1971. J.A. 140, 186.

3/ cont., Edgefield County among the black voters who strongly favored the adoption of a single member district system of election, Juris. S.A. 36a, but even though they filed enough signatures to require a referendum, the County Council refused to call one...." Appellants' Brief on the Merits 13. The basis for their assertion that there was substantial support among Edgefield County blacks for the single-member district method is a conclusion by the Justice Department that its "information" was to that effect. J.S. App. 36a. The appellants' characterization of the circumstances surrounding the failure to hold a referendum is disingenuous. The petition was not timely filed, the South Carolina Supreme Court so decided (which decision this Court was not asked to review) and the appellants have so agreed. J.A. 135.

On August 3, 1978, the United States Department of Justice wrote to Edgefield County requesting that the 1976 ordinance be pre-cleared. By letter dated September 29, 1978, Edgefield County's implementation of home rule was submitted to the United States Attorney General, who received it on October 3, 1979. On November 3, 1978, the United States Attorney General requested additional information and the submission was completed on December 10, 1978. J. A. 136.

On February 8, 1979, the United States Attorney General by letter interposed an objection to Edgefield County's submission. J.A. 136, J.S. App. 29a. In view of the Attorney General's outstanding objection, the Edgefield County Council, on April 9, 1979, took action to "pursue the implementation" of the single-member district method of election and appointed a citizens advisory committee to propose single-member districts. J.A. 189, 191, 224. Subsequently, however, in

Woods v. Hamilton, 473 F.Supp. 641 (D.S.C. 1979), a three-judge district court held that the pre-clearance of the "home rule" legislation effectively pre-cleared a county which had held no referendum on form of government and had retained its pre-home rule method of election. 473 F.Supp. at 644, n.7. At about the same time, the South Carolina Supreme Court held that a county whose method of election had not been pre-cleared could not have a different method of election established by legislation relating only to that county. Van Fore v. Cooke, 273 S.C. 136, 255 S.E. 2d 339 (1979). The proposed single-member district plan was then held in abeyance until the South Carolina General Assembly could act to resolve the matter by general law. J.A. 216. [4/]

[4/] The appellants' assertion that "the County Council never complied with the objection" [Appellants' Brief on the Merits 16] is not sufficient, the appellees submit,

The appellants moved on April 15, 1980, to enjoin the 1980 at-large elections and on April 17, 1980, the lower court entered the order earlier discussed [supra at 3] 5/ and enjoined further elections until a new method of electing the Edgefield County Council was adopted pursuant to applicable State law. J.A. 137. On April 21, 1980, the Edgefield County Council held a meeting and voted to authorize the county attorney to meet with the lower court, which had retained jurisdiction [J.A. 76], and discuss "the plan of action ... recommended ... by the Citizens

---

4/ cont. to constitute a complete statement of the case in this regard.

5/ Although the dilution issue is not before this Court, the appellants quote extensively from the vacated order in their statement of the case. Appellants' Brief on the Merits 19-22. The appellees simply note that the facts on which the vacated order is based are stale, many of them over ten years old. Among other changes, the appellant McCain became chairman of the Edgefield County Democratic Party. J.A. 224; Record Vol. II, Lybrand Dep., Ex.O., at 2.

Advisory Committee to establish single member districts." J.A. 206. Then, on April 22, 1980, this Court handed down its decision in City of Mobile v. Bolden, 446 U.S. 55 (1980), and the appellants successfully moved to alter, amend or vacate judgment based on that holding. J.A. 138.

In the meantime, the appellants moved to amend their complaint (1) to enjoin an alleged "change" under the Voting Rights Act which occurred when the Edgefield County Council decided to ask the lower court to reconsider the April 17, 1980, order and not to pursue its motion made on April 21, 1980, to inquire into the implementation of single member election districts, (2) to require the pre-clearance of Act No. 1104 of 1966, and (3) to enjoin implementation of the objected to 1976 resolution and ordinance. J.A. 139, 221. Allowance to amend was granted in two orders, one entered on November 24, 1980, and

the other on January 6, 1981. J. A. 102, 119. [6]

On June 7, 1982, the appellants filed a timely appeal [J.S. App. 23a] from the May 10, 1982, opinion of the three-judge district court [7] and this Court noted probable jurisdiction on June 20, 1983.

SUMMARY OF ARGUMENT

The lower court correctly held that the current method of electing the members of the

---

[6] The appellants supplemented their complaint not twice, as they assert [Brief of Appellants on the Merits 23] but three times. J.A. 78, 90, 110. The lower court ruled against the appellants regarding the 1980 actions of the Edgefield County Council [J.S. App. 18a] but apparently they do not appeal that holding.

[7] The three-judge district court consists of the Honorable Clement F. Haynsworth, Jr., the Honorable Donald S. Russell and the Honorable Robert F. Chapman, Judges of the United States Court of Appeals for the Fourth Circuit. J.S. App. 21a. Judge Chapman, as a district court judge, also authored the "dilution issue" order of April 17, 1980, which he subsequently vacated. J.A. 76, 89.

Edgefield County Council was pre-cleared by the United States Department of Justice when it pre-cleared Act No. 521 of 1971. The 1971 statute provides for the at-large election of five Edgefield County Council members from five residency districts to serve two year terms of office and it has been in force in every general election since 1972. The United States Attorney General's attempt to require the submission now, more than a decade after it was last in effect, of the unpre-cleared 1966 enactment which Act No. 521 of 1971 amended is in fact and in effect an attempt to modify his 1971 pre-clearance which he is precluded from doing. Morris v. Gressette, 432 U.S. 491 (1977).

The lower court was also correct in finding that the Attorney General's outstanding objection to the 1976 Edgefield County ordinance which formally continues the provisions of Act No. 521 of 1971 on the ground that the expansion of powers granted

to South Carolina counties by the 1975 enactment of general law provisions is a "change" subject to Section 5 pre-clearance is without merit because the expansion of powers, if a change at all, was pre-cleared in 1975.

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE CURRENT METHOD OF ELECTING THE MEMBERS OF THE EDGEFIELD COUNTY COUNCIL HAS BEEN PRE-CLEARED BY THE UNITED STATES DEPARTMENT OF JUSTICE PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965.

A. Act No. 1104 of 1966.

There is no dispute that Edgefield County is a political subdivision subject to the pre-clearance provisions of Section 5 of the Voting Rights Act of 1965. J.A. 139; J. S. App. 6a. There is also no dispute that the first Section 5 "change" which occurred in Edgefield County was the enactment of Act No. 1104 of 1966. [8/] The lower court found

---

[8/] The first three sections of Act No. 1104 divided Edgefield County into three residency districts for the purpose of electing the

that the 1966 legislation had not been pre-cleared [J.S. App. 6a] and there are no records discovered to date which manifest that it was submitted either to the District Court for the District of Columbia or to the United States Attorney General for pre-clearance. J.A. 131. [9/] That finding would

---

[8/] cont. county governing body, provided for the creation of a system of county government in Edgefield County and created the Edgefield County Council, respectively. The remaining seven sections provided for its functioning and powers. J.A. 154.

[9/] Although the lower court has found that the 1966 statute was not submitted for pre-clearance, the appellees note that the inability to locate any record manifesting the submission does not necessarily prove that there was no submission. At least twice already in this action, records of Section 5 submissions which could not be located at the time they were sought were subsequently found. J.A. 219; Brief for the United States as Amicus Curiae 8. Furthermore, there is nothing in the record before this Court to indicate whether or not any procedure is (and has been since 1966) in place within the Justice Department for handling and safeguarding individual submission files. Finally, in Perkins v. Matthews, 400 U.S. 379 (1971), this Court noted that "... only South Carolina has complied rigorously with §5. Through June 1969, it submitted 252 changes for approval, including all three annexations

be significant, indeed, determinative but for the fact that the election provisions of Act No. 1104 have not been in effect since 1971.[10/]

B. Act No. 521 of 1971.

I. Act No. 521, which amended the election provisions of Act No. 1104 of 1966, was submitted to the United States Attorney general pursuant to Section 5 and was pre-cleared.

On June 25, 1971, the South Carolina General Assembly enacted Act No. 521 of 1971 entitled "An Act To Amend Act 1104 Of 1966, As Amended, Relating To A System Of County

---

9/ cont. (and one consolidation) that were approved by the state legislature between 1965 and 1969." 400 U.S. at 393, n. 11. By the end of 1970 it had made 441 submissions, none of which was objected to, and was the only covered jurisdiction with such a record at that time. See Hearings on H. R. 939... before Subcommittee on Civil and Constitutional Rights of House Judiciary Committee, 94th Cong. 1st Sess. ser. No. 1, pt.1, 537 (1975); Hearings before Subcommittee on Civil and Constitutional Rights of House Judiciary Committee on Extension of Voting Rights Act, 97th Cong., 1st Sess. ser. No. 24, pt. 3, 2239 (1981).

10/ The "powers" provisions have not been in effect since 1976. Infra at 50.

Government For Edgefield County, So As To Increase The Number Of Districts And The Number Of County Council Members." J. A. 167. Section 1 of Act No. 521 amended Section 1 of the 1966 statute, which had set forth the three residency districts for the three-member Edgefield County Council, by "striking it out and inserting" a new Section 1. Id. New Section 1 set forth five new residency districts for a five-member Edgefield County Council. Section 2 of Act No. 521 amended Section 3 of the 1966 statute, which had created the Edgefield County Council and provided for its at-large election for two year terms, by "striking it out and inserting" a new Section 3. J.A. 168. New Section 3 provided for the at-large election of the new five-member Edgefield County Council to serve two year terms. Id. The remaining provisions of the 1966 statute were not affected by the 1971 amendment.

The South Carolina Attorney General

submitted Act No. 521 (designated as "H2206"), together with seventeen other pieces of legislation enacted in 1971, to the United States Attorney General for Section 5 pre-clearance on July 21, 1971. Brief for the United States as Amicus Curiae App. 1a. Thereafter, the Justice Department asked for additional information including boundary maps of both the then-existing residency districts and the proposed districts, population and registration statistics for the two sets of districts, candidates for and results of the last two Edgefield County Council primary and general elections and "a copy of the election statute now in force." J.A. 238. The available additional information requested was forwarded to the Justice Department on September 24, 1971, [J.A. 244] and included as a part of that information a copy of the election provisions of Act No. 1104 of 1966. J.A. 247. Then, on November 24, 1971, the United States Attorney

General forwarded to the State Attorney General's office his letter pre-clearing Act No. 521. J.A. 125.

II. The pre-clearance of Act No. 521 of 1971 pre-cleared the at-large with residency districts election of a five-member Edgefield County Council for two year terms of office.

First, as Act No. 521 manifests, it provides completely for the membership and election of the Edgefield County Council without reference to the 1966 statute except to, in effect, repeal it pro tanto and substitute new provisions which are the same as the 1966 statute in some respects and different in others. One of the lower court's findings is to the same effect:

> Analysis of the language of the two acts - 1966 Act No. 1104 and 1971 Act No. 521 - compels rejection of plaintiffs' contention that failure to submit Act No. 1104 dooms the present method of electing the Edgefield County Council. Although Act No. 521 changed only the number of residency districts and members of the council, the Act provides for the 'striking out' of all provisions of the 1966 Act dealing

> with the form and method of electing county council. The Act then substitutes completely new provisions for the form and method of election of Edgefield County Council, including provisions for the at-large with residency requirement form of election. J.S. App. 13a.

The Edgefield County Council provided for by Act No. 521 was to be made up of five members, not three, from five new, not two additional, residency districts. 11/ They were to be elected at-large from the county for two year terms as the three-member

---

11/ The three 1966 districts were prescribed as follows: District No. 1 included Johnston No. 1, Johnston No. 2, Long Branch, Central & Bacon precincts; District No. 2 included Trenton, Merriwether, Colliers, Cleveland and Red Hill precincts; and District No. 3 included Edgefield No. 1, Edgefield No. 2, Kendall, Moss, Rock Hill, Pleasant Lane and Meeting Street precincts. J.A. 154. The five districts created in 1971 were prescribed as follows: District No. 1 included Johnston No. 1, Johnston No. 2 and Long Branch precincts; District No. 2 included Trenton, Central and Bacon precincts; District No. 3 included Edgefield No. 1 and Edgefield No. 2 precincts; District No. 4 included Merriwether, Colliers, Cleveland and Kendall precincts; and District No. 5 included Red Hill, Rock Hill, Moss, Meeting Street and Pleasant Lane precincts. J.A. 168.

predecessor council had been. The fact that the title described only the two changes does not sustain the appellants' argument that the Attorney General pre-cleared only those two changes for to argue that the Attorney General pre-cleared only the changes described in the title is to presume that he read no further than the title and therefore pre-cleared only the title. This presumption is borne out neither by reason nor by the Attorney General's subsequent actions.

The Attorney General's subsequent actions provide the second reason that the lower court's decision regarding the scope of the 1971 pre-clearance is correct. He wrote to the submitting officials asking for certain information so that he could make a determination based on "sufficient data." J.A. 238. He requested, inter alia, "a copy of the election statute now in force." Id. [emphasis added]. The election provisions of

the 1966 statute, not merely "the existing three election districts" as the appellants assert, [12] were promptly forwarded to him. He also requested and received maps showing the boundaries of the three predecessor districts and the five new districts, the voter registration by race for the two sets of districts and the candidates for and results of the past two Edgefield County Council primary and general elections. J.A. 238, 246. The requested population information was not available and he was so advised. Id.

What did the United States Attorney General then do? (1) He did not request a

---

[12] Appellants' Brief on the Merits 11. The appellants emphasize the fact that only the first page of the five-page 1966 statute was forwarded, arguing that that action is "evidence that the State itself regarded the 1971 submission as involving only an increase in the size of the Council." Id. 48, n.18. On the contrary, only the election provisions (all of which were included on the first page) were forwarded because they were the only ones requested and, the appellees submit, relevant.

complete copy of the 1966 statute; (2) he did not request a copy of the letter pre-clearing the 1966 statute; and (3) he did not ask for a copy of the election statute in force on November 1, 1964 - all of which actions were available to him in his discretion. See Garcia v. Uvalde County, 455 F. Supp. 101, 105 (1978), aff'd 439 U.S. 1059 (1979). Instead, his next action was to pre-clear Act No. 521 of 1971. 13/ That he pre-cleared the 1971 statute upon receiving the requested information manifests, first, that he then had "sufficient data" on which to base his

---

13/ To argue, as the appellants do [Appellants' Brief on the Merits 11], that the pre-clearance letter relates only to the increased membership argues against the express language of the pre-clearance letter which states in part:

> The Attorney General interposes no objection to the change in question. J.A. 125.

It does not restrict its conclusion to the increase in membership only but, instead, does not object to the "change in question," i. e., the 1971 enactment itself. The phrase "change in question" is in fact form language routinely used by the Justice Department in its letters approving legislation. Docket Sheet entry of July 20, 1981 (Exhs. 1, 2 and 3).

decision. Second, with the election provisions of the 1966 statute before him, he either determined that those provisions had in fact been pre-cleared [supra, n. 9 at 17] or he determined that they were no longer relevant because they had been superseded by the 1971 statute. The appellants' assertion that the Attorney General pre-cleared only the increased membership unrealistically and unreasonably assumes that the Attorney General, with the 1966 election provisions before him, compared those provisions (which, he now asserts, were never approved) with the 1971 statute and decided to interpose no objection to its increased membership feature without passing upon the validity of its at-large with residency districts or two year terms of office features. But the possible discriminatory purpose or effect of the increased membership could not have been determined "in isolation from the 'preexisting' elements" of the method of

electing the Edgefield County Council. City of Lockhart v. United States, __ U.S. __, 74 L.Ed. 2d 863 at 870, 103 S.Ct. 998 (1983). [14/] Moreover, as argued earlier [supra at 22], the 1971 statute did not merely increase the membership or the number of residency districts - it created five new residency districts for a new five-member Edgefield County Council elected at-large for two year terms.

The lower court characterized the Attorney General's actions regarding the 1971 submission as follows:

> Plaintiffs' arguments would require this court to find that the Attorney General did not consider the effect of at-large, as opposed to district, voting when he elected not to object to 1971 Act No. 521. Analysis of both the facts before the Attorney General and his

---

14/ The Attorney General could have objected to the five new districts in the context of the unchanged (and presumably pre-cleared) at-large with residency districts method of election [id.], which would have rendered unenforceable the entire method of election provided for, including the at-large with residency districts feature.

requests for additional information do not bear out plaintiffs' argument.

Although 1971 Act No. 521 is entitled 'An Act To Amend Act 1104 of 1966 . . . So As To Increase The Number of Districts And The Number of County Council Members,' every indication is that the Attorney General did not limit his consideration of the Act to the change in number of districts and number of council members. In the late summer of 1971, David L. Norman of the Justice Department contacted state officials and requested additional information in connection with the evaluation of Act No. 521. Norman asked that the State provide 'maps showing the boundaries of the County Council districts under the existing statute as well as under [Act No. 521].' He also requested 'population and registration statistics, by race, for the present election districts and the proposed election districts as well as a copy of the election statute now in force.' (emphasis added). Mr. Norman additionally stated, 'It will also be necessary for us to know the names, and race, of all candidates for County Council in the last two primary and general elections, and the results of these elections by district.' All of the requested information was submitted to the Justice Department except the population of the election districts by race, which information was not available.

> The information requested and received by Norman indicates that he had the 1966 Act before him and was aware that the form and method of election of the Edgefield County Council then in effect had been adopted in 1966. Norman's letter requesting information about the former districts and results of elections by race indicates that Justice Department's review of Act No. 521 encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966. J.S. App. 10a - 12a [emphasis original].

The appellants rely heavily on language in Allen v. State Board of Elections, 393 U.S. 544 (1969), followed in United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110 (1978), and in City of Rome v. United States, 446 U.S. 156 (1980), that a Section 5 submission to the United States Attorney General must be made in an "unambiguous and recordable manner ... with a request for his consideration pursuant to the Act." 393 U.S. 571. The appellees have no argument with that language; indeed, they followed it precisely when they

submitted Act No. 521 of 1971. They submitted the statute, together with seventeen others, to the United States Attorney General "[i]n accordance with the provisions of Section 5 of the Voting Rights Act of 1965." Brief for the United States as Amicus Curiae App. 1a. They promptly responded to the Attorney General's request for additional information. J.A. 237-248. The Attorney General's request manifests that he was in fact considering the statute pursuant to his Section 5 authority. These facts are not even remotely similar to those in Allen, where service of a covered jurisdiction's brief on the Attorney General was held not to be a sufficient submission, in Board of Commissioners of Sheffield, Ala., where the pre-clearance letter was expressly conditional, or in City of Rome, where the pre-clearance of general law provisions containing a municipal election code did not

pre-clear local variations. 15/

Instead, the appellees urge that Edgefield County's facts are similar to those found in United States v. Georgia, Civil Action No. C76-1531A (N.D. Ga. September 30, 1977), aff'd 436 U.S. 941 (1978). There, a pre-November 1, 1964, Georgia statute completely revised that State's general election code. The statute provided that it

---

15/ Furthermore, in Allen, unlike here, the submitting authorities admitted that they had made no "formal" submission to the Attorney General. 393 U.S. 571. In Board of Commissioners of Sheffield, Ala., this Court rejected the argument that the Attorney General "should be charged with notice of all provisions of local law." 435 U.S. 137, n. 28. Here, the Attorney General had actual notice of the provisions of the 1966 statute. Also, while this Court rejected the "pre-clearance by silence" argument in Sheffield [id. at 136-138], here the Attorney General affirmatively decided not to object. Finally, in City of Rome, the State submitted a general law stating that the State deferred to local charters and ordinances regarding specific election practices without submitting those local charters and ordinances. Here, the appellees submitted precisely what they wanted pre-cleared, i. e., the method of election provided by Act No. 521 of 1971.

did not go into effect for county elections until after the 1964 general election and the district court held, first, that the changes effected by the statute were Section 5 changes because they were not in force on November 1, 1964. The 1964 statute had never been submitted but Georgia contended that the United States Attorney General had had four occasions to review it when, in reviewing revisions to the code in 1968, 1969, 1970 and 1971, "he could have discovered that the complained of provisions had taken effect with regard to candidates for governing office of a county after November 1, 1964." No. C76-1531A, slip op. at 5. The Court declared:

> ...Central to the question of whether the provisions complained of have, in fact, been precleared is a determination of what constitutes a 'submission' of a change within the meaning of the Voting Rights Act of 1965. Prior to September, 1971, there were no regulations specifying the proper manner in which a submission should be made....
>
> ****

> In the absence of any requirement that a specific submission procedure by followed, this court finds that the submission of the entire election code of Georgia to the Attorney General with the request that he consider any changes constituted a submission of the matter to the Attorney General in an unambiguous and recordable manner as required by Allen. Id. at 5-6.

The pre-clearance of the revised election code in 1970, the court concluded, also pre-cleared two provisions retained therein from the 1964 statute notwithstanding they had not been specifically called to the Attorney General's attention as changes. The court rejected the Attorney General's attempted objection to those two provisions years later and this Court summarily affirmed. 16/

16/ ...Summary actions, ... should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

The appellants' attempt to distinguish the Georgia facts is unavailing. Appellants'

The appellants contend that the lower court erred when it held that the 1966 statute had been pre-cleared in the context of the 1971 statute rather than by reference to the practice in effect on November 1, 1964. Appellants' Brief on the Merits 51. The appellees respond by pointing out that apparently the United States Attorney General does not agree because his request for the election statute "now in force" is inconsistent with that contention. And when he received a copy of the election provisions of the 1966 statute, he did not then request a copy of the election statute in effect on November 1, 1964. Even assuming arguendo that the Attorney General pre-cleared only the new districts and increased membership, nevertheless he did not compare those

---

16/ cont. Brief on the Merits 40, n. 16. Here, as there, the Attorney General later interpreted the change to have been pre-cleared [J.S. App. 29a; infra at 40] and a court decision indicated that the change had been pre-cleared. J.A.; infra at 39.

features with the voting practice in place on November 1, 1964. While it is undisputed that Section 5 specifies November 1, 1964, as the relevant date and while the Attorney General may have erred in not comparing the 1971 statute to the voting practice in effect on November 1, 1964, that error should not be charged against the lower court or the submitting officials. 17/

The appellants also argue strongly that both the United States Congress and the decisions of this Court place upon the covered jurisdictions the burden of complying with the Section 5 pre-clearance requirements. The appellees agree with this statement of the law and assert equally strongly that they met that burden, first,

---

17/ ... Congress - like the courts - operates on the assumption that the Attorney General of the United States will perform faithfully his statutory responsibilities. Morris v. Gressette, 432 U.S. 506, n. 23.

when they submitted Act No. 521 of 1971 for pre-clearance and, finally, when they complied with the Attorney General's request. Notwithstanding the appellants' highly offensive characterization of the lower court's order as one which allows covered jurisdictions to make "a shell game out of Section 5" [Appellants' Brief on the Merits 63], there is no evidence that Edgefield County has done anything but make a good faith attempt to comply with Section 5, a law whose "potential severity" and "extraordinary remedy of postponing the implementation of validly enacted state legislation" this Court has repeatedly recognized. Morris v. Gressette, 432 U.S. 504.

III. The Justice Department's regulations neither are nor should be controlling here.

There is no dispute that the Justice Department did not promulgate Section 5 guidelines until September, 1971. Appellants' Brief on the Merits 41. But Act

No. 521 of 1971 was submitted on July 21, 1971 [Brief for the United States as Amicus Curiae App. 1a], two months before their publication. The appellants' assertion that the guidelines were published "two weeks before South Carolina responded to the Department of Justice's request for additional information" [Appellants' Brief on the Merits 41] is answered by pointing out that the Attorney General was free, perhaps, duty-bound, to require the appellees to conform their submission to his new guidelines, if he felt that it was necessary, when he requested the additional information on September 14, 1971, four days after the guidelines were published. J.A. 241. Significantly, he did not even mention the new guidelines in his request. Because it is the Attorney General's duty to enforce his guidelines [cf. Morris v. Gressette, 432 U.S. 491, 506, n. 23; Service v. Dulles, 354 U.S. 363, 372 (1957); Harris v. Levi, 416 F. Supp.

208, 210 (D.D.C. 1976), aff'd in part and vacated in part on other grounds and remanded sub nom. Harris v. Bell, 562 F.2d 772 (D.C. Cir. 1977)], if he does not, he should be deemed either to have determined that they are being complied with (as the appellees submit they were in 1971) or to have waived them. And even less can the 1976 and 1981 amended guidelines be applied retroactively to the 1971 submission. See Miller v. United States, 294 U.S. 435, 439 (1935); Compare Automobile Club of Michigan v. C.I.R., 353 U.S. 180, 184 (1957).

The appellees submit that there is an additional reason that the guidelines should not control here, a reason far more compelling that the fact that they were not in effect when the submission was made. The court in United States v. Georgia, supra, referred to it as a "general acceptance" of the fact that the provisions subsequently challenged were in fact earlier pre-cleared.

No. C76-1531A, slip op. at 7. For nine years and through at least two submissions, all concerned parties (including the United States Attorney General) assumed that the current method of electing the Edgefield County Council was prescribed by Act No. 521 of 1971, which had been pre-cleared in 1971. First, the members of the Edgefield County Council assumed it for they have been elected pursuant to its provisions beginning with the 1972 general election. J.A. 140. Second, the appellants assumed it for their original 1974 complaint contained allegations naming only the 1971 statute as the statute prescribing the method of election. J.A. 12. Third, the district court's vacated "dilution issue" order recited only that the 1971 statute had been submitted and pre-cleared [J.A. 43], implying, the appellees submit, that the pre-clearance of the 1966 statute was irrelevant. Fourth, the South Carolina Attorney General assumed it as evidenced by

that office's response to the United States Attorney General's December 12, 1980, letter requesting that the 1966 statute be submitted. J.A. 213. Finally, that the United States Attorney General assumed it for nine years in manifested by his actions during that time. To begin with, he pre-cleared the 1971 statute with actual notice of the election provisions of the 1966 statute. That was his first opportunity to verify whether or not the 1966 statute had been pre-cleared and, if not, whether or not it mattered. Then, in 1974, when he declined to object to another amendment to the 1966 statute [J.A. 220], he had a second opportunity to analyze the 1966 statute if he had thought it relevant. Most significant, however, is his 1979 objection to the Edgefield County ordinance and resolution continuing the method of election prescribed in Act No. 521 of 1971, to wit:

> ... Our analysis reveals that ... under the proposed ordinance

> implementing Home Rule, council members will be elected at large from residency districts. While this is, ostensibly, the same system of election used by the county in electing its present council, we note differences in that body as presently constituted and as it would exist under the Home Rule Act. J.S. App. 29a - 30a [emphasis added].

The fact that the method of election was ostensibly unchanged would not have been relevant had the Attorney General not interpreted that method of election as already having been pre-cleared.

This nine-year interpretation on the part of the United States Attorney General that he had pre-cleared the method of electing the Edgefield County Council is, the appellees submit, the one which this Court should find is entitled to weight. The appellants' repeated assertion that the Attorney General's 1980 "please submit" letter reflects a "consistent" interpretation of the scope of his 1971 pre-clearance and is therefore entitled to deference totally

ignores nine years of inaction by the Justice Department based on a contrary interpretation. And to argue, as they do, that the lower court "disregarded" the Attorney General's 1980 interpretation when it concluded that "every indication is that the Attorney General did not limit his [1971] consideration" [Appellants' Brief on the Merits 39-40] [emphasis added] is to implausibly give the 1980 interpretation nine years' retroactive effect. Again in United States v. Georgia, supra, the district court responded appropriately, the appellees contend, to a similar assertion:

> Although arguments of waiver and estoppel have been abandoned by the State, the court is constrained to note that the Attorney General's delay of eleven years in bringing an action ... to force the State to submit the complained of provisions to a preclearance procedure is inexcusable .... For the Justice Department to attack provisions ... which have been in effect for eleven years on the sole basis that said provisions have not been precleared and with no allegations that these provisions are in any manner violative of the letter or

> the spirit of the fifteenth amendment to the United States Constitution borders on the absurd. C76-1531A, slip op. at 7 [emphasis added]. 18/

The district court's opinion in United States v. Georgia echoes this Court's injunction that there is "to be 'no dragging out' of the extraordinary federal remedy beyond the period specified in the statute." Morris v. Gressette, 432 U.S. 504.

IV. The pre-clearance of Act No. 521 of 1971 renders moot the Attorney General's 1980 "please submit" letter.

Assuming that the 1966 legislation was required to be submitted for pre-clearance before implementation and assuming further that it was not in fact submitted, the issue of whether or not it complies with the 1965

18/ Significantly, the appellants' amended complaint alleging that the 1966 statute has not been pre-cleared does not contain any allegation that the statute violates the Fifteenth Amendment or otherwise has a racially discriminatory purpose or effect. J.A. 110. See, e.g., United States v. Saint Landry Parish School Board, 601 F.2d 859, 865 (5th Cir. 1979).

Voting Rights Act became moot when the 1971 legislation was enacted and subsequently pre-cleared. The appellants' position that the 1966 legislation, which is not in force at the present time, has not been in force for over a decade and as to which no attempt at enforcement is being made, is subject to Justice Department review was rejected by the lower court:

> ... Since the Attorney General approved the at-large with residence districts form of elections in 1971, any defect in the 1966 Act No. 1104 is moot. J.A. App. 12a.

That the issue of whether or not the 1966 legislation was implemented without pre-clearance is not a justiciable one is further evidenced by the difficulty of fashioning appropriate relief should this Court reverse the lower court's holding that the 1966 statute need not be submitted to the Attorney General for pre-clearance. J.S. App. 20a. Its enforcement could not properly be enjoined because it is not being enforced;

the revival of its predecessor legislation, i. e., an appointed board of commissioners, with an appointed supervisor would violate South Carolina law, both statutory [§§ 4-9-10 et seq. CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended] and constitutional [S.C. CONST. art. VIII, § 7; Duncan v. The County of York, 267 S.C. 327, 228 S.E.2d 92, 98-99 (1976)]; and the replacement of the 1966 method of election with one which has not been put into effect without pre-clearance would continue the method of election that is currently being used and has consistently been used since the 1972 general election [J.A. 140], i. e., the already pre-cleared method of election prescribed by Act No. 521 of 1971. 19/

Accordingly, the appellees submit that the lower court was correct in holding on

---

19/ The lower court concluded:

> ...It would serve no useful purpose at this late date to set aside the 1966 Act. J.S. App. 12a.

mootness grounds [20] that they are not required to respond to the Attorney General's December 12, 1980, request that they submit Act No. 1104 of 1966 for pre-clearance.

V. The method of election prescribed by Act No. 521 of 1971 is unchanged by the enactment of the "home rule" legislation and the adoption of the implementing ordinance and resolution.

Before discussing the merits of the issue regarding the "home rule" legislation and the implementing ordinance and resolution adopted by the Edgefield County Council on June 21, 1976, the appellees question whether or not that issue is still before this Court. The United States Attorney General, who appears only as amicus curiae herein,

---

[20] The appellees also note that this Court's holding that a unpre-cleared change, once pre-cleared, is no longer subject to Section 5 review for "the matter [is] at an end" [Berry v. Doles, 438 U.S. 190, 193 (1978)], can fairly be interpreted to apply here where the pre-clearance has been effected by the pre-clearance of a superseding change.

accurately states that, because he did not appeal the decision in Woods v. Hamilton, 473 F. Supp. 641 (D.S.C. 1979), he is estopped from relitigating the issue of his pre-clearance of the "home rule" legislation. Brief for the United States as Amicus Curiae 13, n. 10; Brief for the United States as Amicus Curiae Urging Reversal 23. He offers his argument relitigating that issue apparently only in support of the appellants, who are not so estopped. Id. But the appellants seem to retreat from this issue, asserting that this Court "need not reach the issue whether the 1976 transfer of powers is a covered change and whether the Attorney General's objection is enforceable." Appellants' Brief on the Merits 59. 21/

21/ It also appears that they no longer dispute that the lower court acted within its authority in determining whether or not the Attorney General's outstanding objection to the 1976 ordinance and resolution is a valid one. Compare J.S. 13-14 and Appellants' Brief on the Merits 29. The appellees refer this Court to their own earlier argument

Assuming the "home rule" issue is reached, however, the appellees submit that the lower court correctly applied the Woods v. Hamilton holding as follows:

> Plaintiffs argue that implementation of the Home Rule Act in Edgefield County was a change in election procedure subject to § 5 of the Act. This issue was addressed in Woods v. Hamilton, supra at 644-47, where the court held that the ministerial act of passing ordinances implementing the Home Rule Act (which Act had previously been precleared) in Charleston County, were not "changes" covered by § 5 of the Voting Rights Act. Id., at 647. ... We hold that the Attorney General's June 27, [sic] 1975 letter to state officials precleared both the holding of referenda and the transfer of powers under the Home Rule Act. We also hold that the June 21, 1976 resolution and ordinance resulted in no change in the form or method of electing Edgefield County Council, and that the June 21 resolution and ordinance are not a change subject to § 5 preclearance. ... J.S. App. 16a - 18a.

21/ cont. [Motion to Dismiss or Affirm 12-14] in the event that the appellants do in fact continue to dispute the lower court's holding in this regard. See also Garcia v. Uvalde County, 455 F. Supp 101 (1978), aff'd 439 U.S. 1059 (1979); Georgia v. United States, 411 U.S. 526 (1973).

Woods v. Hamilton discussed in detail the history of the submission and pre-clearance of the "home rule" legislation in 1975. 473 F.Supp. 644 - 647. It first noted that:

> It is apparent from the [submission] letter that the State submitted the entire Home Rule Act to the United States Attorney General for his consideration within the sixty-day statutory period. For the purposes of this opinion, the main features of the submitted Act were threefold:
>
> 1. It authorized the permissive holding of a referendum by each county to determine a form of government which additionally included a method of election. (S.C. Code § 4-9-10(a), (b)).
>
> 2. It transferred to the counties, regardless of the choice made in (1), substantial powers. (S.C. Code § 4-9-30).
>
> 3. It mandated the assumption - (either by choice or inaction) - of a particular form of government by each county. (S.C. Code § 4-9-10). 473 F.Supp. 644-645 [emphasis original].

After quoting the Attorney General's approval letter in its entirety, the court concluded:

> A close reading of this letter reveals that (1) the Attorney

> General expressly did not object to the holding of a referendum; (2) he attempted to reserve the right to object to the implementation in the counties of the several forms of government - (which by statute included the methods of election, S.C. Code § 4-9-10(b)); and (3) he made no mention of the transfer of powers. A review of the applicable legal principles convinces this court that the effect of the letter was to preclear both the holding of referenda and the transfer of powers, so that these matters could proceed without further preclearance. This determination, combined with this court's finding that there was no change as to the method of election and form of government - (see fn. 7, supra) - leads to the conclusion that Charleston County has, based on the letter of August 28, 1975, from the Attorney General of the United States, made a valid transfer of powers to its local governing body. Id.

The Court then applied the holding in Morris v. Gressette, 432 U.S. 491 (1977), that the Attorney General has only sixty days in which to respond to a completed submission, and declared:

> ...Here, the Attorney General's silence on the transfer of powers in the Home Rule Act clearly dooms

his belated attempt to label the assumption of such powers by the county council as an 'uncleared change.' Whatever may have been the motive of the Attorney General in failing to object to the transfer of powers in his August 28, 1975, letter, the fact remains that the State submitted the entire Home Rule Act and, under the law, the Attorney General of the United States was required to pass on all components of a complete submission at that time (i. e., at the least, those steps in the submission certain to occur without further action, or requiring only further ministerial action on the part of the state political entity). In this respect, the case differs significantly from the situation in United States v. Board of Commissioners of Sheffield, Alabama, in which case the city submitted a letter which 'sought approval only for the holding of the referendum' (98 S.Ct. at 982). In that case, the Attorney General was informed in the submission letter that if the holding of a referendum was precleared, and the proposal to change the form of government was approved in such referendum, the city would, under the statutory law, revert to a prior form of government; however, the submission letter did not request preclearance of the form-of-government 'change' but the letter merely volunteered such information in the submission statement. Since the question of preclearance of the admitted 'change' to a different form of government was not presented to the

> Attorney General, the Supreme Court held that when that 'change' was, in fact, accomplished, it would have to be submitted. In the present case, however, the mandatory transfer of powers was submitted to the Attorney General, and he was charged with the knowledge from a review of the Act that, regardless of the form of government chosen or assigned, the new government would assume the enumerated powers. In this posture, it is an inescapable result, in this court's opinion, that the failure to object to the transfer of powers precleared that 'change' - (assuming, arguendo, that such transfer was a 'change') - depriving the Attorney General of a 'second bite at the apple' at any subsequent time. The situation here closely resembles that found in United States v. Georgia, ... In the instant case, whether by oversight or design, the Attorney General did not object to the mandatory transfer of powers, and he is bound by his inaction. 473 F.Supp. 646-647 [citations and citations to footnotes omitted] [emphasis original].

The appellees submit that the Woods v. Hamilton reasoning and result are manifestly correct and should be followed here. The expansion of powers granted to the Edgefield County Council by the "home rule" legisla-

tion, if a Section 5 change at all, [22] was precleared by the pre-clearance of the "home

---

[22] Although it is argued that the issue of whether or not a transfer of powers is a change within the meaning of Section 5 is not before this Court [Brief for the United States as Amicus Curiae Urging Reversal 21-22], the appellees would reverse the Attorney General's assertion [id.22, n. 18] and note that no court has held that a transfer of powers is a Section 5 change. The appellants' contention to the contrary notwithstanding [Appellants' Brief on the Merits 57, n. 20], Horry County v. United States, 449 F.Supp. 990 (1978), accepts that theory merely as an "alternate reason" for its finding that Horry County was in violation of Section 5. 449 F.Supp. 995; see also Woods v. Hamilton, 473 F.Supp. 644. The appellees earlier distinguished Horry County from this case in other respects. See Motion to Dismiss or Affirm 18-20. That the Voting Rights Act does not contemplate that a transfer of powers alone is a covered change is manifested by the words of the statute itself. It speaks of changes "with respect to voting." In Allen v. State Board of Elections, 393 U.S. 544, 566, 568 (1969), this Court declared that Section 5 relates to even the most minor change in state "election" law. In Perkins v. Matthews, 400 U.S. 379, 387 (1971), this Court characterized Allen as holding that the legislative intent was to reach any state enactments "which altered the election law." The Attorney General's guidelines define a change "affecting voting" as a Section 5 change. 28 C.F.R. § 51.2(d); see also 28 C.F.R. § 51.12.

rule" legislation. 23/

Furthermore, the appellants have agreed that the provisions of the "home rule" legislation as applied to the Edgefield County Council continue "the method of election (at-large with residency districts) prescribed by Act No. 521 of 1971. J.A. 140 [emphasis added]. If the appellees are correct that the Attorney General pre-cleared Act No. 521 of 1971 in its entirety [supra at 21], then the pro forma adoption of the June 21, 1976, ordinance and resolution has not

---

23/ See also State Board of Election Commissioners v. Evers, 405 U.S. 1001, 1003 (1972) (Blackmun, J., concurring):

> Section 5, it seems to me plainly and clearly provides that if the procedure has been properly submitted to the Attorney General, as it was, 'and the Attorney General has not interposed an objection within sixty days after such submission,' as he did not, the proposed statutory changes 'may be enforced' without the Court proceeding in the District of Columbia and without resubmission to the Attorney General. [Emphasis added.]

effected a Section 5 change. Instead, as Woods v. Hamilton noted, "it is doubtful that the ministerial act of passing adoptive ordinances, such as done here, was ever intended by Congress to be a 'change' when such adoptive ordinances merely implemented statutes which had previously been pre-cleared." 473 F.Supp. 641. See also Jenness v. Little, 306 F.Supp. 925, 927 (N.D. Ga. 1969) (municipal ordinance adopted pursuant to pre-cleared State statute not subject to separate Section 5 submission). 23/ And contrary to the appellants' assertion [Appellants' Brief on the Merits 55, n. 19], the lower court's treatment of the 1976 ordinance and resolution does not contradict the logic of its earlier ruling regarding the

---

23/ The Attorney General amended his guidelines in 1981 to provide that such local implementation is in some instances subject to Section 5 review. 28 C.F.R. § 51.14. As argued earlier [supra at 38], those amended guidelines should not be applied retroactively to a 1978 submission.

statute. Even the appellants concede that the 1971 statute changed the 1966 statute. The 1976 ordinance and resolution quite simply did not change the 1971 statute.

VI. The Attorney General's pre-clearance of Act No. 521 of 1971 is not subject to judicial review.

Because the current method of electing the Edgefield County Council is prescribed by Act No. 521 of 1971, [24/] which has been pre-cleared, the appellees submit this Court need go no further in its review of this action than to apply the holding of Morris v. Gressette, 432 U.S. 491 (1977), that the United States Attorney General's decision not to interpose a timely objection to a Section 5 submission is not subject to judicial review. Cf. Briscoe v. Bell, 432 U.S. 404 (1977). This Court, in deciding in Morris v. Gressette that an objection interposed nunc pro tunc is invalid even when sanctioned by a federal district court, declared:

24/ J.A. 140; supra at 46.

> In light of the potential severity of the § 5 remedy, the statutory language, and the legislative history, we think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. 432 U.S. 504.

Here, as in Morris v. Gressette, "[i]t is conceded that no objection [to the 1971 act] was entered within the 60-day period." 432 U.S. 499-500; J.A. 131-132. Moreover, it cannot be successfully argued that the 1971 submission was not a complete one inasmuch as pre-clearance came only after Edgefield County had fulfilled the Justice Department's request for the additional information which it deemed necessary in order to have "sufficient data" [J.A. 238] to review the submitted legislation. And unlike the alternative pre-clearance method provided by the District Court for the District of

Columbia, Section 5 pre-clearance by the Justice Department does not require that the United States Attorney General affirm that the change is without discriminatory purpose or effect:

> ...To the contrary, compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the Attorney General. 432 U.S. 502 [emphasis original].

Finally, this Court recognized that even if the Attorney General's decision not to object "may have been erroneous..., it nonetheless was a decision exercised pursuant to the Attorney General's § 5 responsibilities" [432 U.S. 507 n. 24] and judicial review of it is foreclosed.

The Morris v. Gressette facts were, the appellees submit, harsher than here because in that case the failure to object was based on the Attorney General's belief that he was without authority to object. Here, with all of the information, including the election provisions of the 1966 statute, which he

deemed necessary before him, the Attorney General decided, "for whatever reason" [432 U.S. 502], not to object. The fact that this Court did not qualify its non-review policy in Morris v. Gressette even where the application of that policy may have had an arguably unintended result [25/] is a strong indication that no such qualification exists where, as here, the Attorney General, looking back a decade later, may wish to modify the scope of his decision not to object. This tardy action is precisely what the time restrictions of Section 5 review were designed to prevent [432 U.S. 503-505; see also Allen v. State Board of Elections, 393 U.S. 544, 549 (1969); Georgia v. United States, 441 U.S. 526, 538 (1973)]; otherwise, Section 5 review of a particular submission might never "come to an end." 432 U.S. 502.

25/ See 432 U.S. 508, 516, Marshall, J., dissenting.

Accordingly, the appellees submit that Morris v. Gressette precludes both the appellants and the United States Attorney General from asking this Court to review in any way that official's 1971 pre-clearance, including a review of the scope of that pre-clearance. Once the Attorney General decided not to object to Act No. 521 of 1971, his Section 5 authority over Act No. 521 of 1971 ceased. It cannot now be asserted that he did not mean what he said when he decided not to object; he may now feel that his decision "may have been erroneous" [432 U.S. 507, n. 24], but it was a decision which he exercised pursuant to Section 5 and is therefore unreviewable.

This result does not leave the appellants without a way to pursue their claim that the current method of electing the Edgefield County Council is a racially discriminatory method. The Voting Rights Act expressly does not bar constitutional

challenges to implemented legislation; indeed, there is one pending in this action. Supra at 4.

Finally, this Court should note that the black voters of Edgefield County can easily trigger a change in the method of election pursuant to Section 4-9-10(c), CODE OF LAWS OF SOUTH CAROLINA, 1976 (Cum. Supp.), which provides that ten percent of the registered voters can petition for a referendum to change to the single-member election district method of election.

CONCLUSION

The appellees respectfully submit that the judgment entered in the cause by the three-judge District Court for the District of South Carolina should be affirmed.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

TREVA G. ASHWORTH
Senior Assistant
Attorney General

Post Office Box 11549
Columbia, SC 29211

KAREN LeCRAFT HENDERSON*

Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

CHARLES W. COLEMAN

Post Office Box 70
Edgefield, SC 29824

ATTORNEYS FOR APPELLEES.

*Counsel of Record

CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for the Appellees and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the Appellees' Brief on the Merits were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed to the counsel of record for the Appellants as follows: LAUGHLIN McDONALD, ESQUIRE, 52 Fairlie Street, N.W., Atlanta, Georgia 30303 and REX E. LEE, Solicitor General, Department of Justice, Washington, D.C. 20530.

This 6th day of September, 1983.

Karen LeCraft Henderson
KAREN LeCRAFT HENDERSON

Post Office Box 11458
Columbia, S.C. 29211